



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 52 OF 2017

BETWEEN

T M M.....APPELLANT

AND

CHINA CIVIL ENGINEERING CONSTRUCTION

CORPORATION (K) LIMITED.....RESPONDENT

(Being an appeal from decision of the Employment & Labour Relations Court of Kenya at Mombasa (Makau, J.) dated 9th June, 2017

in

ELC Cause No.860 of 2016.)

JUDGMENT OF THE COURT

1. T M M (the appellant) filed a memorandum of claim before the Employment and Labour Relations Court (ELRC) on 9th November, 2016 claiming the following reliefs;-

(i) Underpayments at Kshs.11,041.20.

(ii) One month salary in lieu of notice Kshs.16,872.40.

(iii) Maximum compensation for wrongful dismissal and unfair termination of employment contract as per section 49 and 50 of the Employment Act at Kshs.202,468.80

(iv) Damages for unlawful exposure to sexual harassment and invasion.

a) Underpayment at Kshs.11,041.20

b) One (1) month salary in lieu of notice 16,872.40

c) Maximum compensation for wrongful dismissal and unfair termination of employment contract, as per section 49 and 50 of the Employment act, at Kshs.202,468.80.

d) Damages for unlawful exposure to sexual harassment and invasion of human dignity and privacy by the Respondent.

e) Certificate of Service

f) Any further entitlement and/or order that the Honourable may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the Claimant/Grievant submits on in his final filed submissions.

g) Costs of the Cause.

h) Interest on prayer (a), (b), (c) and (e) above from the date of filing this cause till payment in full.

2. In support of her claim, the appellant told the court that she was employed by the respondent on 1st February, 2016 as a store keeper. She said that her supervisor one **Mr. Nzai Diangfeng** had been sexually harassing her but she had rebuffed him. On the material date, that is 20th May 2016, he found her in the store alone and asked her for some key which she did not have. He is then said to have referred to her as a thief and removed her from the office. She went to hospital where she was treated and given sick off. She said that while on sick off, her boss one **Mr. Hemming** called her and told her not to report back to work. She reported the matter to the police station and Mr. Zai was thereafter arrested and charged with assaulting her vide **Criminal Case No. 1182 of 2016**. He admitted the charge on plea and was dealt with in accordance with the law. He is later said to have gone back to China.

3. According to the appellant, her termination was both unlawful and unfair, and she was not given notice as required by law, nor was she given a hearing before being terminated. She therefore went to court seeking reliefs as listed above. The claim was opposed by the respondent who averred that there was no underpayment of the appellant; she was not a store keeper; that she was not terminated from employment and that she had absconded after being given 2 days sick off. The claims of sexual harassment were also denied. The respondent urged the court to dismiss the claim in the entirety.

4. At the hearing, Penina Kungu, the respondent's Human Resources Manager testified on the respondent's behalf. She told the court that the appellant had never reported any sexual harassment incident to her and that she absconded from work after she was given sick leave and never reported back. It was therefore the respondent's case that the appellant was never terminated and she was not entitled to any compensation.

5. After considering the evidence and submissions by counsel, the court (**Makau, J.**) rendered the judgment now impugned on 9th June 2017. The learned Judge found that the appellant had been unfairly terminated and awarded her Kshs.16,872.00 being one month salary in lieu of notice, plus Kshs.67,488.00 being four months' salary as compensation for unfair termination. She was also awarded money for underpayment. The total award amounted to Kshs.94,353.00 plus costs and interest. The learned Judge however found the claim for compensation on grounds of sexual harassment not proved as the appellant had not reported any sexual harassment incidents before the report against Mr. Zai at the Police Station. The learned Judge also expressed that:-

“the fact that the blow landed on the claimant's breast did not per se render the offence of sexual harassment.”

6. The appellant was aggrieved by that part of the judgment and has challenged the same before this Court in this appeal. Basically, the learned Judge was faulted for declining to award the appellant compensation under the head of sexual harassment. According to the appellant, the learned Judge misapprehended the fact that the claim for exposure of sexual harassment was solely based on the fact that the blow landed on her breasts instead of limiting himself to the pleadings and evidence proffered by the appellant.

7. Interestingly, the appellant's memorandum of appeal has no prayers but in the written submissions filed on her behalf by her counsel, she has asked for an award of Kshs.4,000,000.00 for exposure to sexual harassment.

8. The appeal was fully canvassed by way of written submissions the appellant's submissions having been filed on 2nd March, 2018, while those by the respondent were filed on 16th March, 2018. According to learned counsel for the appellant, Mr. Zai had time and again harassed the appellant sexually and offered to pay her Kshs.3,000.00 and to also talk to her boss for a salary increase. According to the appellant, she had reported these sexual advances to one **Mr. Ji Hemming** who instead of taking action against Mr. Zai, only asked her to accede to the propositions.

9. Learned counsel for the appellant cited several authorities on sexual harassment where compensation had been awarded and urged us to award the appellant 4,000,000.00 as compensation. Mr. Omwenga learned counsel for the respondent opposed the appeal, and maintained that the trial court had correctly found that the appellant did not prove her allegations of sexual harassment and that the same was an afterthought. He urged us to disregard the cases cited by counsel for the appellant as sexual harassment had actually been proved in those cases unlike in the appellant's case. He urged us to dismiss the appeal.

10. This being a first appeal, as rightly observed by learned counsel for the appellant, it behooves us to reappraise the evidence adduced before the trial court critically and arrive at our own decision. We have done so in line with **Rule 29(1)** of the Rules of this Court. We note that although the appellant claims to have been propositioned by Mr. Nzai and offered money, she did not report the matter to the Human Resource Manager, which is the department charged with handling such complaints by employees. She said she reported to one **Ji Hemming**, who just encouraged her to accede and take the money. Why did she not report to Penina Kungu, a woman like her and who would be easier to approach than **Mr. Hemming**. When Mr. Hemming did nothing, why did she not escalate the matter to another senior person?

11. We note further that in her statement to the police which was recorded on 3rd June 2016, the appellant did not even mention that Mr. Nzai used to sexually harass her. In her statement, she said that her supervisor went and fetched Mr. Zai and they both went to her as they tried to resolve the matter. She did not mention anything about sexual harassment in the presence of Mr. Zai and her supervisor. The assault report at the police station only talked about being hit on the breasts and not about being sexually harassed previously. If indeed she had been sexually harassed before that incident, why did she not raise the issue? Like the learned Judge, we are inclined to find that the complaint on sexual harassment appears to have been an afterthought, if anything, only meant to aggravate the amount of damages claimed. We find no evidence of sexual harassment prior to the assault incident. We agree with the learned Judge that the claim for sexual harassment was not well founded and was not proved to the required standard. It was rightly dismissed. As this appeal was only in respect of the sexual harassment claim, we have no basis for revisiting the rest of the award.

12. In conclusion, we find this appeal devoid of merit and dismiss it with no orders as to costs.

Dated and delivered at Malindi this 24th day of May, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR